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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1045

JACK HERMAN,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 210 N.E.2d 249.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Petitioner's statement of the questions presented does not comply with Rule 23(c) of this Court. Respondent, therefore, will attempt to restate the questions raised as gleaned from the entire petition.

1. Whether the State's answer to the Defendant's notice of alibi stating that the offense had been committed "between 6:00 o'clock A.M., May 28, 1963 and 12:00 noon of May 29, 1963," was so vague that the denial by the trial court of the motion to make more specific violated the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

   a. Whether vagueness in an answer to a notice of alibi is subject to the void for vagueness doctrine of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

   b. Whether a vague answer to notice of alibi, where the defendant must file such a notice if alibi is to be relied upon as a defense at the trial, constitutes an involuntary disclosure by the defendant and violates the Self-Incrimination Clause of the Fifth Amendment as embodied in the Fourteenth Amendment to the Constitution of the United States.

2. Whether the state law requirement that grounds for a motion for new trial be set forth specifically and where not done are waived for purposes of appeal, violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

3. Whether the examination of a witness by the trial court prior to ruling on the objection to the admission of a document violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

4. Whether the admission into evidence of an accounting tape of the gambling organization and testimony of the bribe payor's agent as to the purpose of paying the money to the policeman constituted the admission of hearsay evi-

dence in violation of the Confrontation Clause of the Sixth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of Indiana, Art. 1, sec. 13:

> "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

Burns' IND. STAT. ANN., § 9-1632:

> "Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less than ten [10] days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense. The notice shall include specific information in regard to the exact place at which the defendant claims to have been at the time stated in the indictment or affidavit as the time of such offense. The provisions of this statute shall not apply in case the court sets the trial for a date less than fourteen [14] days ahead."

Burns IND. STAT. ANN., § 9-1632:

> "In the defendant's notice, as provided in the next preceding section, the defendant may also expressly require the prosecuting attorney to file and to serve upon the defendant or upon his counsel a specific

statement in regard to the exact date which the prosecution proposes to present at the trial as the date when, and the exact place which the prosecution proposes to present at the trial as the place where, the defendant was alleged to have committed or to have participated in the offense. If the defendant's notice requires such statement by the prosecuting attorney, or if the prosecuting attorneys proposes to present at the trial as the specific date when the defendant committed or participated in the offense a date other than the date stated in the defendant's notice, the prosecuting attorney shall file and serve such statement upon the defendant or upon his counsel not later than eight [8] days before the trial. If the prosecuting attorney's statement to the defendant names a specific date other than the date which is stated in the indictment or affidavit and in the defendant's notice, the defendant shall not later than four [4] days after the filing of the prosecuting attorney's statement file and serve upon the prosecuting attorney defendant's second notice presenting for such changed date the same details required for the original notice."

STATEMENT OF CASE

The Petitioner, Jack Herman, was indicated and convicted of bribery, after a trial by jury in Division One of the Criminal Court for Marion County, Indiana, and sentenced to a term of two to fourteen years in prison and a fine of $1,000. The conviction was affirmed by the Supreme Court of Indiana.

There was a large scale gambling operation in the City of Indianapolis from the late 1930's through the early 1960's which was owned by one Isaac (Tuffy) Mitchell. Mitchell had acquired a long police record during these

years (Tr. p. 192) and became well known to the Indianapolis Police Deparement as a numbers racketeer. (Tr. p. 173)

The size of the Mitchell operation is indicated by State's Exhibits 7, 8, 9, and 10 which are accounting tapes. These tapes reflect a net intake of $8,200 during the four days preceding its demise. (Tr. pp. 394-398)

The organization depended upon numbers customers who seldom waged more than $1.00 and often as little as one penny. Each day the winning number would appear in a newspaper column entitled "How the Stocks Did" which reported the New York Stock Exchange Averages. The last number of the closing price on industrials, rails and utilities would be taken in that order. The fourth number in four number combinations would be the digit immediately before the decimal in the low figure for industrials. (Tr. p. 249) At this point all relationships to the stock market ceased. Because there was no way of controlling the outcome, customers were permitted to select the number they wished to play. (Tr. p. 249) Customers would select their numbers from dream books, license plates or from the street address of a new acquaintance. (Tr. p. 249)

Numbers players were served by free-lance employees of the organization and designated "writers." The number of writers varied between 300 and 500 within the Mitchell organization. (Tr. p. 246)

The writers would inscribe the number being wagered on in triplicate in an order book together with the writer's code number. (Tr. p. 250 and p. 247) One of the three copies would be given to the customer, another retained by the writer, and the third turned over to the Mitchell organization. (Tr. p. 250) The organization's copy was turned over

to a messenger who was designated as a "runner." (Tr. p. 246) These runners would take the slips to another organization employee known as the "pick-up man." The pick-up men would take the wagering slips to the count house where the winning slips would be separated from the others and the day's expenses and profits computed. (Tr. p. 246) The location of the count house was constantly being changed and was known to only a very few people. (Tr. p. 250)

At the count house the receipts, winning wagers, salaries, commissions, rent, utility bills and all miscellaneous expenditures were accounted for to the last penny. (Tr. pp. 252-253) It was understood by all that Tuffy Mitchell trusted no one and double-checked all recorded expenses. (Tr. pp. 294-295)

Despite the business efficiency of the Mitchell organization, it was subject to police harassment. The Mitchell organization absorbed the costs of bail bondsmen, lawyer, and fine whenever any of its employees were arrested. (Tr. p. 253) Their expenses were paid by Mitchell's chief aide, Van Wert Mullin. Mullin prepared accounting tapes covering these expenditures. (Tr. pp. 305-306) Bribe payments paid to policemen were handled in the same manner. (Tr. p. 318)

The accounting tapes show bribe payments to more than 100 Indianapolis Policemen. (Tr. p. 318) These payments were made with regularity at the end of every twenty-eight day police shift. (Tr. p. 260) Police captains received $30.00 per shift (Tr. p. 270-271), and lieutenants and sergeants received $20.00 per shift. (Tr. p. 271) Bribes made to other public officials ranged up to $1,500.00.

After Mitchell assigned the bribe paying task to Mullin, he introduced him to all the cooperative members of the police force.

Between 1947 and 1960, Jack Herman, as an Indianapolis policeman, had made a large number of numbers arrests. (Tr. pp. 529-530)

Mullin and Herman first met on introduction by Tuffy Mitchell at Mitchell's Pink Poodle on that occasion with his wife and another police officer and his wife. (Tr. p. 256) The two couples had gone there for some barbeque. The two policemen discovered a party inside and had their wives join them. (Tr. p. 580) After the party, the group went to Mullins house where they partook of a case of whiskey. (Tr. p. 256) Herman had twelve to fifteen conversations with Mitchell prior to his introduction to Mullin. The meeting at the Pink Poodle was his last encounter with Mitchell. (Tr. p. 561) Thereafter his meetings were with Mullin. (Tr. p. 522)

On May 29, 1963, Herman was a sergeant on the Indianapolis Police Force assigned to car No. 7 on the north side of the city. (Tr. p. 164) Herman was working twelve hour shifts on that date due to the increased workload that attended the "Indianapolis 500" race. These shifts ran from 8:30 P.M. until 8:30 A.M. (Tr. p. 169)

At 7:20 A.M. on May 29, 1963, Herman reported that he was leaving his patrol car to check a possible vice violation. (Tr. p. 220; State's Exhibit No. 3) At or about the same time, Mullin received a telephone call from Herman asking if he were going to be home and that he would be dropping by his house. (Tr. p. 238) After completing the telephone conversation, Herman drove into the alley behind Mullin's house. Herman was in uniform and still driving the police

car. (Tr. p. 238) After conversing, Mullin gave Herman $40.00 and went back into his house. (Tr. p. 238) Of the $40.00 which Mullin gave to Herman, $20.00 was for Herman and the other $20.00 for another policeman. (Tr. pp. 239-240) In exchange for the $20.00, Herman was to avoid harassing Tuffy Mitchell, his agents, customers, writers, and pick-up men. (Tr. p. 246) The $20.00 constituted compensation for Herman's services for a period of time beginning with the immediate preceding Sunday and ending four Sundays hence with the next change of shift. (Tr. p. 243)

Mullin's house was in an area outside Herman's assigned district. (Tr. pp. 175 and 237)

Herman admitted being at Mullin's house between two and four times in the six months period immediately prior to May 29, 1963 (Tr. pp. 543, 548, 549) as well as meeting him at places other than Mullin's home. (Tr. pp. 550-551)

On the Saturday immediately following the payment to Herman, June 1, 1963, Mullin made a routine accounting of the week's expenditures to Tuffy Mitchell. This accounting included a tape of the bribe transactions which had transpired during the preceding week. (Tr. pp. 261, 267; State's Exhibit No. 6) This tape was found in Mitchell's wallet during a search of Mitchell's house by federal Internal Revenue Agents who conducted a raid on Mitchell on June 2, 1963. (Tr. p. 356) The search also produced gambling paraphernalia and accounting tapes.

During the five months immediately preceding the raid on Mitchell, Herman made no numbers arrests, (Tr. pp. 528-529) but in the three months preceding his indictment and after the raid, Herman made five numbers arrests. (Tr. pp. 530-531)

In March, 1964 Mullin was called before the Marion County, Indiana, Grand Jury where he refused to testify. He was brought into court where the court ordered him to testify. (Tr. p. 312) Subsequent to Mullin's testimony before the grand jury, an indictment was returned against Herman. The same grand jury also returned an indictment against Mullin. (Tr. p. 285)

Subsequently, on August 6, 1964, the deputy prosecutors assigned to this case visited Mullin at the federal penitentiary in Terre Haute, Indiana. Mullin refused to discuss the case with them, (Tr. p. 284) because he was under indictment for bribery as a result of his testimony before the grand jury. (Tr. p. 286) Thereafter, Mullin was informed by the prosecutor that the State had no case against him for bribery because of the immunity he received when he testified before the grand jury and the charge would be nolled. Mullin then agreed to testify in this case. (Tr. pp. 319-320, 333)

Prior to trial, petitioner filed a notice of alibi. (Tr. p. 24) The state thereafter filed an answer to the notice of alibi. (Tr. p. 31) Petitioner thereafter filed a motion to make the State's answer to notice of alibi more specific (Tr. p. 34), which was overruled. (Tr. p. 45) Petitioner then filed a second notice of defense of alibi. (Tr. pp. 47-48) The state moved to amend the indictment (Tr. p. 56), which was granted (Tr. p. 59) over the Petitioner's objections. (Tr. pp. 57-58) Petitioner was subsequently convicted after a trial by jury.

SUMMARY OF ARGUMENT

The petition in this case represents the ultimate in vagueness and verbosity. This fact alone would warrant denial

of the petition under Rule 23 (j)(4) of this Court. Neither were the issues presented by the petition raised as constitutional questions in the state courts.

Petitioner contends that the state's answer to a notice of alibi was vague thereby inadequately apprising him of the disclosure on his part. The contention in no way fits within Constitutional protections. The void for vagueness doctrine has not been extended to pleadings other than the initial indictment. Petitioner has not given authority or reasoning for extending this doctrine to later pleadings dealing with the alibi defense. Even assuming the doctrine did apply, the state's answer to the notice of alibi was not so vague as to undermine the preparation of a defense. Further, the possible indirect involuntary disclosure was not of a nature that compelled the accused to testify against himself.

A state requirement that the grounds for a motion for new trial be set forth specifically or are waived for purposes of appeal does not constitute a hardship of such magnitude as to warrant a finding of violation of Equal Protection. It is a sound rule of appellate practice that works in favor of the criminal defendant of limited financial means. In any event, this defendant is not an indigent or pauper.

There is even less merit in the other two contentions made by the Petitioner. The trial court's examination of a witness prior to ruling on an objection to the admission into evidence of a document was a proper exercise of discretion in the search for truth.

Neither was the petitioner convicted on hearsay evidence. The testimony of the bribe payor as to the purpose of the payment was not hearsay since it appeared that it was within his personal knowledge. The accounting tape was

admissible under the business record or res gestae exceptions to the hearsay rule.

The petition fails to present a federal question of sufficient merit to warrant a granting of a writ of certiorari to the Supreme Court of Indiana and should therefore be unequivocably denied.

ARGUMENT

I.

VAGUENESS IN AN ANSWER TO A NOTICE OF ALIBI IS NOT SUBJECT TO THE VOID FOR VAGUENESS DOCTRINE OF THE DUE PROCESS CLAUSE.

This Court has frequently stated the concept that due process requires that an indictment or information give sufficient notice of the specific criminal charge to enable the person charged to make his defense. *In re Oliver,* 333 U.S. 257 (1948); *United States v. Cruikshank,* 92 U.S. 542 (1875). Petitioner now asks this Court to extend that principle to a peculiar form of state procedure, *i.e.,* the state's answer to a defendant's notice of alibi. Petitioner has not buttressed his contention with authority or reasoning, probably because neither exist.

The indictment in the case at bar was neither vague nor ambiguous. (Tr. p. 4) The trial court properly overruled the Petitioner's motion to quash for uncertainty. (Tr. pp. 14, 20) Petitioner then filed his notice of alibi in accordance with Burns IND. STAT. ANN., § 9-1631. The State answered the notice in accordance with Burns IND. STAT. ANN., § 9-1632, setting forth the date and time of the offense. Section 9-1632 and the State's answer in the case at

bar sufficiently apprised the defendant of the crime charged to meet due process requirements. Facts were presented to the accused in the case at bar equivalent to that which could have been produced by a bill of particulars. Therefore, there is no valid reason available for this Court to extend the vagueness doctrine of factual pleadings subsequent to the indictment. The Constitution of Indiana, Art. 1, § 13, and Burns, § 9-1632, *supra,* provide adequate safeguards to ensure the accused's apprisal of the offense charged. This Court has limited the vagueness doctrine to prosecution's initial pleading and there is nothing in the case at bar to merit its extension.

A.

Assuming arguendo the application of the vagueness doctrine of due process to subsequent factual pleadings, the State's answer to the notice of alibi was not vague or ambiguous.

Petitioner contends that the trial court's denial of his motion to make the State's answer to alibi more specific violated the Due Process Clause. Petitioner's contention is wholly without merit.

The pertinent portion of the State's answer stated:

> "The time and date which the prosecution proposes to present at the trial of the above-entitled cause as the time and date when the defendant committed the offense charged was: Between 6:00 o'clock A.M. May 28, 1963 and 12:00 noon of May 29, 1963." (Tr. p. 31)

It is difficult to see how the State's answer could have been more specific particularly when it was filed in August, 1964, at a time when Van Wert Mullin was refusing to discuss the case with the attorneys for the State.

During the trial the time of the offense was given as being between 8:00 A.M. and 10:00 A.M. on May 29, 1963, and possibly as early at 7:00 A.M. or as late as 11:00 A.M. (Tr. pp. 309-310)

Petitioner's Amended Notice of Alibi actually covered the time which was eventually fixed as the time of the offense. The amended notice stated in pertinent part:

> "May 29, 1963
>
> "12:00 o'clock midnight to 8:15 A.M. On duty as a police officer within Police District #7 and at Indianapolis Police Headquarters.
>
> "8:15 o'clock A.M. to 8:30 o'clock A.M. Driving from Indianapolis Police Headquarters directly to 1817 King Avenue. 8:30 o'clock A.M. to 12:00 noon." (Tr. p. 48)

Petitioner's evidence in support of the Amended Notice of Alibi consisted of the testimony of policeman Charles Powell who testified that he saw the Petitioner at 12:53 A.M. at the Woodstock Country Club on May 29, 1963. Policeman Powell also testified that he saw him two or three other times that night but could not recall the exact times or places. (Tr. p. 474)

Another policeman, George Bornstein, as a defense witness, testified that he saw the Petitioner at 11:36 P.M. on May 28, 1963, at 2041 North College. (Tr. p. 479)

Police Officer Raymond Hutchens also testified for the defendant, stating that he had seen the Petitioner at 4:35 A.M. on May 29, at 38th Street and Washington Boulevard.

Another defense witness, policeman Charles Cress testified that he met the Petitioner several times on the night of May 28-29, but could not recall times or places. (Tr. p. 485)

Policeman James Mullin, who was indicted with Petitioner (Tr. p. 505) testified that on May 29, 1963, he used the same patrol car which Herman had used the previous night and had picked up the keys to it at the police department's information desk at 8:15 A.M. on the 29th. (Tr. pp. 503-504)

Petitioner's wife testified that he had arrived home at approximately 8:15 A.M. (Tr. p. 579)

Petitioner's evidence clearly shows that he was not harmed by the fact that the State's answer to his notice of alibi covered a period of thirty hours. It is obvious that Petitioner was able to present all available evidence pertinent to his alibi defense. The record clearly mitigates against Petitioner's contention that the answer was so vague as to impair the preparation of a defense.

The Supreme Court of Indiana properly held that the trial court had not abused its discretion in denying the motion to make the answer more specific.

B.

The Indiana Supreme Court's decision is not at variance with this Court's decision in Minnesota v. National Tea Company.

Petitioner's contention concerning ambiguous or obscure adjudication by the Indiana Supreme Court on the amendment of the indictment and possible conflict in the decision with an earlier decision of the same court is difficult of comprehension. Even more difficult of comprehension is the application of *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940), to the case at bar. In that case this Court reversed the decision of the state holding the state graduated tax on gross income from chain stores unconstitutional.

This Court stated that it was vacating the judgment because it was uncertain from the state court's opinion whether the decision was based upon the state constitution or the federal constitution. This is hardly true of the case at bar, where none of the questions below were dicusssed in a constitutional context—state or federal.

C.

Assuming arguendo that the State's answer to the notice of alibi was vague, it did not constitute an involuntary disclosure by the defendant under the Self-Incrimination Clause.

Petitioner contends that the statutory requirement of filing notice of alibi and the state's vague answer, assuming arguendo that it was vague, when viewed under the surrounding circumstances constituted an involuntary disclosure by the defendant in violation of the Self-Incrimination Clause. Petitioner's contention, while raised for the first time in the proceedings in this Court, is ingenious but far from the pale of the Fifth Amendment. He seeks to have this Court adopt a principle of speculative self-incrimination.

Petitioner places great reliance upon *Ferguson v. Georgia,* 365 U.S. 570 (1961) and *Griffin v. California,* 380 U. S. 609 (1965), but neither support his contention. In both of those cases, the state law's effect on the accused's testimony or refusal to testify clearly undermined Fifth Amendment rights, but such is not the case in the facts at bar. Under the Georgia statute struck down in *Ferguson,* an accused could take the stand in his own defense, but could not be subjected to direct or cross-examination by counsel. The obvious result of such practice was to deny an accused a formulated, direct presentation of his side of the case

under the guiding hand of one trained in the law. The practice in substance denied an accused the right to present his side of the case in the most favorable light to him, contrary to the Self-Incrimination Clause. The practice in California held invalid in *Griffin v. California, supra,* was an even more obvious violation of the Self-Incrimination Clause. There the California Constitution permitted court and counsel to comment to the jury on an accused's failure to take the stand. This right to comment naturally placed an accused in the position of testifying or being seriously prejudiced by not doing so. Circumstances of this nature are not present in the case at bar.

By providing notice of the defense of alibi, an accused is not testifying or subjecting himself to cross-examination. Notice of alibi does not necessarily mean that it will come from the accused's own lips. The opposite is more probable in the normal circumstances. The alibi will usually be proved by third-party witnesses. Disclosure having a possible indirect effect on petitioner's evidence has been held by this Court to involve no violation of the Self-Incrimination Clause. *Cohen v. Hurley,* 366 U.S. 117 (1961).

The *Cohen* case, decided in the same year as *Ferguson v. Georgia, supra,* reflects a rejection by this Court of the principle of speculative-self-incrimination. The *Cohen* case demonstrates the natural reluctance to indulge in hypothetical, academic deductions on the effect of requirements of disclosure and indirect application of the Self-Incrimination Clause. *Cohen* properly limits the *Ferguson* case as the furthest this Court will go in applying the Fifth Amendment to indirect self-incrimination.

Petitioner's contention is far afield of Fifth Amendment protections and should be unequivocably rejected by this Court.

II.

STATE APPELLATE PROCEDURE HOLDING THAT ERRORS ARE DEEMED WAIVED WHERE NOT SET FORTH WITH SPECIFICITY IN A MOTION FOR NEW TRIAL DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Petitioner erroneously contends that Burns IND. STAT. ANN., § 9-1903, as interpreted by the Supreme Court of Indiana, and Indiana Supreme Court Rule 2-6 works such a hardship upon criminal defendants of limited financial means as to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Griffin v. Illinois, 351 U.S. 12 (1956) and *Douglas v. California,* 372 U.S. 353 (1963), relied upon by Petitioner, are inapplicable to the case at bar. Both of those cases involved indigent defendants, whereas in the case at bar, the criminal defendant is not a pauper. *Henry v. Mississippi,* 379 U.S. 443 (1965), likewise affords no comfort to the Petitioner.

Henry turned on the issue of a valid waiver of alleged error in the admission of evidence obtained by an illegal search and seizure. This Court pointed out that the question might involve a federal right. The case at bar does not involve the issue of waiver of a federally protected right.

Henry v. Mississippi, supra, also held that this Court will not disturb state court rules on waiver where the rules serve a legitimate state interest. Burns § 9-1903, *supra,* and Rule 2-6, most certainly serve a legitimate and necessary state interest.

The rule of exactness in the motion for new trial has an obvious purpose. It is to clearly apprise the trial court of

the alleged error committed. Until he rules on the specific question there is nothing for the appellate court to review. Appellate courts in Indiana, like her sister states, are historically and statutorily review courts—not courts of original jurisdiction. Further, the necessity of specificity in the motion for new trial may serve to make appeal unnecessary. If sufficient grounds are set forth, the trial court has a duty to grant a new trial thereby eliminating need for an expensive appeal. The motion for new trial, therefore, should work to the favor of the criminal defendant, who is not a pauper, but of limited financial means. The absence of a motion for new trial procedure providing for review by the trial court of alleged errors could very well violate the Equal Protection Clause.

The requirement of specificity is natural in our system of jurisprudence. Decisions should not be made in a fog or on a vague or hypothetical set of circumstances. A judgment resulting from a long and arduous jury trial should not be set aside lightly. Specifics, not generalities, should be the basis for setting aside a judgment and granting a new trial.

There is no merit to Petitioner's assertion that he was denied equal protection and due process by the specificity requirement.

III.

THE EXAMINATION OF A WITNESS BY THE TRIAL COURT PRIOR TO RULING ON THE OBJECTION TO THE ADMISSION OF A DOCUMENT DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Petitioner maintains that the trial court's questioning of the witness Mullin concerning an accounting tape (Exhibit

6) prior to admitting it into evidence. Petitioner's petition is wholly without merit.

It is a well recognized principle that trial judges have wide latitude in conducting a trial and examining witnesses. *Buder v. Bell,* 306 F.2d 71 (6th Cir. 1962).

A trial judge may find it necessary, during the course of a trial, to question a witness in the interest of justice. In the case at bar, the trial judge obviously felt that he needed further facts before ruling on the objection to the document. More facts could be produced by his asking the witness a few questions. The trial court was certainly not acting as an advocate, but in accord with well established state law in seeking out truth. *Long v. State,* 95 Ind. 481 (1884). There was no denial of due process to petitioner.

IV.

THE PETITIONER WAS NOT CONVICTED ON THE BASIS OF HEARSAY EVIDENCE.

Petitioner's contention on the question of the admission of alleged hearsay evidence in violation of the Confrontation Clause of the Sixth Amendment to the Constitution is vague at best. Petitioner has not pointed out where this alleged hearsay evidence is located in the transcript. It will be assumed, therefore, that he is referring to the hearsay issues presented to the Supreme Court of Indiana.

A.

Testimony of the witness Mullin as to the purpose of the bribe payment was not hearsay but based upon the witness' personal knowledge.

The witness Mullin testified that the bribe payment made to Petitioner was for the purpose of avoiding police harass-

ment of the Mitchell organization's agents, customers, writers, and pick-up men. (Tr. p. 246) Mullin was intimately involved with the management of Mitchell's numbers operation for a period of fourteen years. There was nothing before the court to indicate that the source of Mullin's information was other than his personal knowledge. Counsel for petitioner asked no preliminary questions to show otherwise. The answer from the witness was in direct response to a direct question.

The statement was not hearsay, and therefore, not in violation of the Confrontation Clause.

B.

The accounting tape was admissible under the business record and res gestae exceptions to the hearsay rule.

The State presented two grounds for admitting the accounting tape (Exhibit 6) into evidence—business record and res gestae exceptions to the hearsay rule. (Tr. p. 264) The Indiana Supreme Court properly reasoned, at length, the admissibility of Exhibit 6, so as to make the same argument herein superfluous. *Herman v. State,* — Ind. —, 210 N.E.2d 249, 256-257 (1965).

The document was not hearsay and, therefore, its admission did not violate the Confrontation Clause.

CONCLUSION

Petitioner has failed to present any federal questions of merit. Therefore, Respondent prays that the petition for writ of certiorari be denied.

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